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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MASAYUKI ARIKAWA, Plaintiff and Appellant, v. NIKKEI SENIOR GARDENS, et al., Defendants and Respondents.	B285711 (Los Angeles County Super. Ct. No. BC572603)

APPEAL from a judgment of the Superior Court of Los Angeles County, John P. Doyle, Judge. Affirmed.

John L. Dodd & Associates, John L. Dodd and Benjamin Ekenes; Timothy J. Donahue for Plaintiff and Appellant.

Gordon & Rees Scully Mansukhani, Debra Ellwood Meppen, Don Willenburg, David Ainbender, Anthony J. Bellone and Shaina L. Kinsberg for Defendants and Respondents Nikkei Senior Gardens, Seniority Inc., Gabriela Perez and Michael Motoyasu.

Masayuki Arikawa appeals from the judgment entered after the trial court granted summary judgment in favor of Nikkei Senior Gardens (Nikkei), Seniority Inc., and two of Nikkei's employees, Michael Motoyasu and Gabriela Perez, in Arikawa's action for wrongful termination, retaliation for making wage-related complaints and related employment claims. Arikawa contends the court erred in denying his request for a continuance of the summary judgment hearing to permit him to obtain a transcript of Motoyasu's recently completed deposition and his request at the hearing for leave to amend his complaint. He also argues triable issues of material fact existed as to some of his claims. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Arikawa's Employment*

Nikkei is an assisted living retirement community in Arleta, California. Arikawa worked for Nikkei as the director of its dining services from July 22, 2011 until his termination in February 2013. Motoyasu is Nikkei's executive director; Perez is Nikkei's director of business services. On February 13, 2013 Perez reported to police that Arikawa had threatened to kill her. Arikawa was arrested at work, and his employment was terminated the next day.

2. *Arikawa's Complaint*

Following his termination, Arikawa sued Nikkei, Seniority,[1] Motoyasu and Perez (collectively the Nikkei parties) alleging against each of them causes of action for age

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[1] Seniority describes itself as an independent entity that offers sales and marketing services, development and senior living consulting and community management services to Nikkei.

discrimination in violation of the Fair Employment and Housing Act (FEHA, Gov. Code, § 12940, subd. (a)), wrongful termination in violation of public policy, slander, and intentional infliction of emotional distress. Against Nikkei and Seniority only he alleged violations of the Labor Code and the applicable Industrial Wage Order for failure to (1) pay overtime (Lab. Code, §§ 510, 1194), (2) provide meal and rest breaks (Lab. Code, §§ 226.7, 512), (3) reimburse for proper business expenses (Lab. Code, §§ 2800, 2802), (4) pay wages owed upon discharge (Lab. Code, §§ 201, 203) and (5) provide itemized wage statements (Lab. Code, § 226). He also alleged the failure to comply with these various Labor Code provisions and FEHA amounted to an unfair business practice (Bus. & Prof. Code, § 17200).

3. *The Nikkei Parties' Motion for Summary Judgment/Summary Adjudication*

The Nikkei parties moved for summary judgment or, in the alternative, summary adjudication addressing each of Arikawa's causes of action.

a. *Wrongful termination claims*

As to the wrongful termination claims based on allegations that Arikawa was fired because he had requested proper payment of his wages, the Nikkei parties cited Arikawa's deposition testimony that he had never complained to anyone at Nikkei about his wages or overtime. Motoyasu's declaration stated the same thing. As for the claim of age discrimination, the Nikkei parties contended Arikawa could not demonstrate a prima facie case for age discrimination, much less that his age was a motivating factor for his termination. The complaint did not even identify Arikawa's age. The Nikkei parties also argued Nikkei

and Seniority had a legitimate business reason for terminating Arikawa: He had threatened to kill Perez.

In his declaration in support of the Nikkei parties' motion, Motoyasu related the events leading up to Arikawa's termination: In December 2013 Arikawa was placed on a performance improvement plan after serving a sushi roll that contained substantial amounts of *wasabi* (a spicy paste made from grinding the root of a Japanese horseradish plant) to a coworker as a prank in violation of the company's anti-violence policy. Arikawa signed the December 2013 performance correction notice but remained angry at the reprimand. A few weeks later Arikawa refused to review an employee's performance document with her, in violation of his job duties, and rebuffed employees under his supervision when they asked him questions.

On February 6, 2014 Motoyasu met with Arikawa to discuss these complaints against him and inform him Nikkei would be investigating. Against Motoyasu's express instructions, Arikawa immediately informed one of the complaining employees about his meeting with Motoyasu and blamed her for instigating the investigation. Motoyasu received more complaints during the investigation. Staff reported Arikawa insisted on speaking Japanese even when non-Japanese speakers under his supervision were present, and he did not provide adequate instructions to non-Japanese speakers. A dining staff employee also told Motoyasu she was too afraid to ask Arikawa if she could go home sick because he had become angry and arbitrary with employees.

Perez testified at her deposition, a transcript of which was included with the Nikkei parties' motion, she had called Arikawa into her office on February 13, 2014 to pick up his reimbursement

check.[2] As he signed the form acknowledging his receipt of the check, Arikawa appeared very agitated and angry. He told Perez, "You're trying to get rid of me. And if you get rid of me, I'm going to kill you." Arikawa left the office, and Perez immediately called the 911 emergency number and reported the threat to law enforcement. She also told Motoyasu about it. Motoyasu fired Arikawa the next day.

b. *Arikawa's claims against Nikkei and Seniority for wage order violations and unfair business practices*

Nikkei and Seniority contended that, as a director of dining services, Arikawa was employed in an executive capacity and was exempt from Labor Code protections afforded to nonexempt employees. In support of this argument, Nikkei and Seniority provided the written job description for the director of dining services, which Arikawa signed when he was hired. The job description identified the essential functions of the position, including Nikkei's expectation that Arikawa supervise all dining staff, plan and implement the menu and oversee the handling, production and storage of food. Nikkei and Seniority also provided Arikawa's deposition testimony acknowledging he was "in charge of everything" kitchen-related: He supervised kitchen staff, reported directly to the executive director (according to Motoyasu, only six other directors reported directly to the executive director), participated in hiring decisions for kitchen positions, advocated successfully for higher salaries for kitchen staff under his supervision, and was directly responsible for the daily menu, as well as the food purchased and served. Arikawa

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[2] When Arikawa shopped for the food for the dining hall, Nikkei reimbursed him for his purchases.

also testified he had received all the money he was owed from Nikkei and/or Seniority and believed no further amounts were due to him. Nikkei and Seniority also supplied evidence Arikawa was paid a monthly salary of $4,463 ($53,560 annually), more than double the legal minimum wage.

c. *Arikawa's claims for slander and intentional infliction of emotional distress against the Nikkei parties*

Relying on Motoyasu's declaration and Perez's deposition testimony, the Nikkei parties argued that their limited reporting of Arikawa's threat to law enforcement and senior employees in the context of making the termination decision was protected under the common interest privilege. The Nikkei parties also argued Arikawa's emotional distress claim, premised on Perez's false reporting of the death threat, was precluded by the workers' compensation exclusivity rule and, in any event, the report was true.

4. *Arikawa's Opposition to the Nikkei Parties' Summary Judgment/Summary Adjudication Motion*

In his opposition papers Arikawa argued triable issues of material fact existed as to whether Arikawa was terminated in violation of FEHA's prohibition of disability/medical condition discrimination and national origin discrimination and whether Nikkei had fabricated the death threat as pretext for terminating his employment in violation of FEHA. He stated, "I was harassed at work because of my ethnicity and my ability to speak Japanese. . . . At one point [Motoyasu] threatened me, about speaking my native language." He also stated that on February 6, 2014 he suffered an injury after falling off a stepladder at work. When Arikawa reported his injury to

Motoyasu, Motoyasu appeared irritated and refused to fill out any paperwork or medical forms. Instead he directed Arikawa to see Perez. Perez, Arikawa asserted, "was likewise irritated and unhelpful." As for the alleged death threat, Arikawa insisted it never happened. He picked up his reimbursement check from Perez on February 13, 2014, thanked her and left her office. Later that day, two police officers arrested Arikawa at work. The next day Nikkei terminated his employment. Arikawa was never charged with a crime. The arrest caused him severe emotional distress.

Arikawa also argued triable issues of material fact existed as to whether he was properly classified as an exempt employee under the applicable wage order. In his declaration Arikawa stated he was simply a cook. He cut fish, cooked and served Japanese food and cleaned the kitchen for the senior center. He had "essentially no discretion over the menu" and had no power to hire or fire employees. Arikawa did not mention his age in his opposition papers or that he was fired as a result of his age or for making wage-related complaints.

Finally, Arikawa requested the court continue the summary judgment hearing pursuant to Code of Civil Procedure section 437c, subdivision (h),[3] because he had not yet obtained the transcript of Motoyasu's recent deposition. Arikawa's counsel supplied a declaration stating in full that he had originally noticed Motoyasu's deposition "to take place a few months back." As a professional courtesy to the Nikkei parties, he "moved the deposition up to a date so recent that the transcript has not yet

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[3] Statutory references are to this code unless otherwise stated.

been completed by the court reporter. In that deposition, Motoyasu essentially changed everything he says in his declaration."[4]

5. *The Nikkei Parties' Reply in Support of Their Motion for Summary Judgment/Summary Adjudication*

In reply the Nikkei parties argued that Arikawa had presented in his opposition papers new theories of disability/medical condition and national origin discrimination that he had not alleged in his complaint. Those new theories, they contended, could not be used to defeat summary judgment. As to the wrongful termination claims he did raise, premised on age discrimination and whistleblower retaliation for complaining about overtime pay, Arikawa had provided no evidence to establish even a prima facie case for those claims. In addition, Arikawa could not raise a triable issue of material fact as to his status as an exempt employee by a declaration that contradicted his own deposition testimony. Finally, the Nikkei parties asserted, Arikawa had not raised, much less established, a triable issue of material fact as to workers' compensation preemption and the common interest privilege directed to his emotional distress and slander claims.

As to Arikawa's request for a continuance of the summary judgment/summary adjudication hearing, the Nikkei parties argued the declaration of Arikawa's counsel failed to fulfill the

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[4] Arikawa's counsel did not include any dates in his declaration. The record on appeal indicates the Nikkei parties filed their motion for summary judgment/adjudication on January 19, 2016, with a hearing scheduled for April 6, 2016; Arikawa's deposition was taken on March 10, 2016; and Arikawa filed his opposition papers on March 23, 2016.

requirements of section 437c, subdivision (h): His counsel did not identify the deposition testimony that allegedly contradicted Motoyasu's declaration nor explain why he could not obtain an expedited transcript, as the Nikkei parties had done. Moreover, they argued, the expedited transcript of Motoyasu's deposition, portions of which were attached to their reply, showed Motoyasu's testimony was fully consistent with his declaration.

6. *The Summary Judgment Hearing and the Court's Ruling Granting Summary Judgment*

The court granted the Nikkei parties' motion for summary judgment, concluding the Nikkei parties had carried their burden on each of Arikawa's claims and Arikawa had failed to raise a triable issue of material fact as to any of them. The court rejected Arikawa's effort to raise national origin and disability/medical condition discrimination for the first time in opposition to the summary judgment/summary adjudication motion, observing Arikawa had not alleged those theories in his complaint. Without addressing them directly, the court also implicitly denied both Arikawa's request for a continuance and his request at the hearing to amend his complaint to state the new theories of national origin and disability/medical condition discrimination.[5]

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[5] Although Arikawa did not file a formal request to amend the complaint, he suggested at the hearing that, to the extent the court concluded the complaint did not state claims for national origin and disability discrimination, he could amend the complaint to "state those claims more clearly."

DISCUSSION

1. *The Court Did Not Err in Denying Arikawa's Request for a Continuance of the Summary Judgment Hearing*

a. *Governing law and standard of review*

Section 437c, subdivision (h), provides, "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time before the date the opposition response to the motion is due."

To comply with section 437c, subdivision (h), the affidavit must demonstrate the facts to be obtained are essential to opposing the motion; there is reason to believe such facts may exist; and the reasons additional time is needed to obtain these facts. (*Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 635, 643 (*Jade*); *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.) "'It is not sufficient under the statute merely to indicate further discovery or investigation is contemplated.'" (*Jade,* at p. 656.) The party must detail both "'the particular essential facts that may exist and the specific reasons why they cannot then be presented.'" (*Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 643 (*Chavez*); accord, *Granadino v. Wells Fargo Bank, N.A.* (2015) 236 Cal.App.4th 411, 420; *Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 715.)

The decision whether to grant a continuance under section 437c, subdivision (h), is reviewed for an abuse of discretion. (*Chavez, supra,* 238 Cal.App.4th at p. 640; *Jade, supra,* 229 Cal.App.4th at p. 643.) Nonetheless, that discretion must be exercised in accordance with the statutory mandate to grant a continuance upon a proper showing. (See *Chavez,* at p. 643 ["'[n]otwithstanding the court's discretion in addressing such continuance requests, "the interests at stake are too high to sanction the denial of a continuance without good reason"'"].)

b. *The declaration of Arikawa's counsel failed to satisfy statutory requirements for a continuance*

The declaration of Arikawa's counsel, Timothy Donahue, fell far short of satisfying the "exacting requirements" of section 437c, subdivision (h). (*Lerma v. County of Orange, supra,* 120 Cal.App.4th at p. 715.) Rather than identifying specific and essential facts from Motoyasu's deposition that contradicted his declaration, Donahue's declaration stated in the broadest of terms that Motoyasu "essentially changed everything" he had said in his declaration. That level of generality is statutorily deficient. (See *Chavez, supra,* 238 Cal.App.4th at p. 643 [declaration from plaintiffs' attorney failed to indicate what evidence the witness would provide or why it was essential to opposing the motion; accordingly, it failed to satisfy requirements of section 437c, subdivision (h)]; *Granadino v. Wells Fargo Bank, N.A., supra,* 236 Cal.App.4th at p. 420 [declaration that stated in conclusory fashion "'additional information and testimony is still required in order to adequately respond to Defendant's motion'" was too general to satisfy requirements of section 437c, subdivision (h)].)

Arikawa alternatively contends that, even if he failed to satisfy the requirements for a "mandatory continuance" under section 437c, subdivision (h), his counsel's declaration attesting that the transcript of Motoyasu's recently taken deposition was not complete was at least sufficient good cause to warrant a discretionary continuance; and the failure to grant that request was an abuse of the court's discretion. At the threshold, Arikawa's request for continuance was based entirely on section 437c, subdivision (h); he did not ask the court, and the court did not consider, whether a continuance was otherwise warranted for good cause. (Cf. *Denton v. City and County of San Francisco* (2017) 16 Cal.App.5th 779, 791 (*Denton*) ["[w]hen, as here, a request for a continuance of a summary judgment motion is made on grounds other than the mandatory basis of Code of Civil Procedure, section 437c, subdivision (h), the court must determine whether the party requesting the continuance has established good cause"]; *Hamilton v. Orange County Sheriff's Dept.* (2017) 8 Cal.App.5th 759, 765 [same].) Accordingly, Arikawa has forfeited the argument. (Cf. *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 81-82 [failure to object in trial court on grounds asserted on appeal results in forfeiture of that argument on appeal].)

Arikawa's good-cause argument also fails on its merits. Quite apart from Arikawa's questionable diligence in obtaining Motoyasu's deposition testimony and transcript,[6] Arikawa's

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[6] Arikawa waited more than a year after filing his lawsuit, until after the Nikkei parties moved for summary judgment/summary adjudication, to initially notice Motoyasu's deposition. He also knew when he postponed Motoyasu's deposition from February 2016 to March 10, 2016 he would have

counsel did not articulate for the trial court, either in his declaration or at the hearing, any reason Motoyasu's deposition testimony was critical to opposing the summary judgment/summary adjudication motion. For all the trial court knew, Motoyasu's testimony at deposition was not inconsistent with his declaration in any material way. Accordingly, even if the court had been presented with the argument, and denied it on the ground Arikawa had failed to carry his good-cause burden, that finding would not have been an abuse of its broad discretion. (*Denton v. City and County of San Francisco, supra,* 16 Cal.App.5th at p. 791 [court's denial of continuance of summary judgment for lack of good cause reviewed for abuse of discretion]; *Levingston v. Kaiser Foundation Health Plan, Inc.* (2018) 26 Cal.App.5th 309, 315 ["'[r]eviewing courts must uphold a trial court's choice not to grant a continuance unless the court has abused its discretion in so doing'"].)

2. *The Court Did Not Err in Granting Summary Judgment*

a. *Standard of review*

A motion for summary judgment or summary adjudication is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (§ 437c, subd. (c).) We review a grant of summary judgment or summary adjudication de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the

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a limited time between the deposition and the due date for his opposition to obtain the transcript. Nevertheless, Arikawa did not seek an expedited transcript of the deposition or explain, either in his declaration or at the hearing, why such an option was not feasible.

moving party or a determination a cause of action has no merit as a matter of law. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 286; *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618.) The evidence must be viewed in the light most favorable to the nonmoving party. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 703; *Schachter*, at p. 618.)

b. *Arikawa's wrongful termination claims*

Arikawa's complaint alleged he was wrongfully terminated in retaliation for requesting his lawful wages[7] and in violation of FEHA's age discrimination protections. As to the first claim, the Nikkei parties provided Arikawa's deposition testimony in which he acknowledged he never complained to anyone at Nikkei about his salary, wages, overtime or rest breaks. Motoyasu's declaration stated the same thing. As to the second claim for age discrimination in violation of FEHA, the Nikkei parties argued Arikawa could not satisfy a prima facie case for age discrimination, much less raise a triable issue of fact that he was terminated based on his age. They observed Arikawa's complaint did not even mention his age and, in any event, Arikawa was terminated for a lawful business reason: He threatened the life of an employee. This evidence shifted the burden to Arikawa to raise a triable issue of fact on the issues of the alleged FEHA

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[7] Although Arikawa's complaint identified FEHA as the basis for this claim, FEHA does not apply when the retaliation is based on something other than a FEHA-protected characteristic or activity. Construed broadly, Arikawa's complaint could state a cause of action under Labor Code section 1102.5 for whistleblower retaliation following a complaint about his alleged wage misclassification.

violation and wage-related retaliation. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 361 [an employer moving for summary judgment on a FEHA cause of action may satisfy its initial burden of proving a cause of action has no merit by showing either that one or more elements of the prima facie case is lacking, or that the adverse employment action was based on legitimate nondiscriminatory factors]; *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1038 [same].)

Arikawa's opposition papers, however, did not address those claims of age discrimination or retaliation for making wage-related complaints. Instead, Arikawa argued triable issues of material fact existed as to whether he ever made the threat Nikkei used to justify his termination. The Nikkei parties insist he threatened Perez's life; he asserts he did not. That evidentiary conflict, as the trial court found, is beside the point. To satisfy even a prima facie case of age discrimination under FEHA, Arikawa must be able to show he suffered an adverse employment action under circumstances that give rise to an inference that the adverse employment action was age-related. (See *Guz v. Bechtel National, Inc., supra,* 20 Cal.4th at p. 361 ["an employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory"]; *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1009 [triable issue of fact as to whether employer's reasons for termination were unwise or incorrect is immaterial; the proper question is whether termination violated FEHA].)

Relying on his declaration, Arikawa contends triable issues of material fact existed as to whether he was terminated because

of his national origin or actual or perceived disability or medical condition, protected characteristics under FEHA. However, as the trial court found, Arikawa did not allege those theories in his complaint. Accordingly, the Nikkei parties were not required to address them; and Arikawa could not rely on them to defeat summary judgment. (See *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 444 ["'[T]he scope of the issues to be properly addressed in [a] summary judgment motion' is generally 'limited to the claims framed by the pleadings. [Citation.] A moving party seeking summary judgment or adjudication is not required to go beyond the allegations of the pleadings with respect to new theories that could have been pled, but for which no motion to amend or supplement the pleading was brought, prior to the hearing on the dispositive motion.'"]; *Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 585 [same]; *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 421 [same].)

Arikawa insists he adequately pleaded both theories because he referred to them in his administrative claim filed with the Department of Fair Employment and Housing, which he attached as an exhibit to his complaint and incorporated by reference.[8] However, Arikawa's administrative claim simply lists multiple causes of action potentially available under FEHA; it does not include any specific or supporting allegations.[9]

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[8] In his first cause of action for wrongful termination in violation of public policy, Arikawa alleged he "was fired in violation of public policy as set forth in exhibit 1, attached."

[9] The administrative complaint states in full: "On or around, [no date is included], complainant alleges that respondent took

Consequently, even if we were to accept Arikawa's incorporation of the administrative complaint by reference as acceptable pleading practice, that administrative complaint does not save his otherwise defective pleading. (See *Soria v. Univision Radio Los Angeles, Inc., supra,* 5 Cal.App.5th at pp. 585, 586 ["[a]lthough Soria used the term 'medical condition' several times, she did not allege she met the definition of having a medical condition under the statute"; "even viewing the pleading liberally, Soria did not allege discrimination based on medical condition sufficiently to put Univision on notice she was asserting this separate claim"]; see also *Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1099 ["the pleading must allege the essential facts 'with reasonable precision and with particularity sufficient to acquaint a defendant with the nature, source and extent of [the] cause of action'"].)

Arikawa contends that, at the very least, the court abused its discretion in denying his request at the hearing to amend the complaint to state causes of action for national origin and disability discrimination. (See *Falcon v. Long Beach Genetics, Inc.* (2014) 224 Cal.App.4th 1263, 1280 (*Falcon*) ["[a] trial court has wide discretion to allow the amendment of pleadings, and

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the following adverse actions against complainant: Discrimination, Harassment, Retaliation, Asked impermissible non-job related questions, Denied a good faith interactive process, Denied a work environment free of discrimination and/or retaliation, Denied reasonable accommodation, Terminated[.] Complainant believes respondent committed these actions because of their: Age-40 and over, Disability, Engagement in Protected Activity, Medical Condition including Cancer." (Bold font omitted.)

generally courts will liberally allow amendments at any stage of the proceeding"].) Assuming a request for leave to amend a complaint may be made for the first time at the summary judgment hearing in an appropriate circumstance,[10] this is not such a case. Arikawa was well aware of the facts comprising his purported disability and national origin discrimination claims at the time he filed the complaint and does not contend he learned any new facts concerning those legal causes of action during the pendency of his lawsuit. Rather, he requested leave only as a last

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[10] The case authorities contain conflicting language on whether a request for leave to amend may be made for the first time at the summary judgment hearing. (Compare *Prue v. Brady Co./San Diego, Inc.* (2015) 242 Cal.App.4th 1367, 1385 ["a request for leave to amend a complaint need not be made before a hearing on a motion for summary judgment; rather, it may be made at the hearing or at any time before entry of judgment"]; *Mediterranean Construction Co. v. State Farm Fire & Casualty Co.* (1998) 66 Cal.App.4th 257, 264, fn. 8 [same] with *Jacobs v. Coldwell Banker Residential Brokerage Co., supra,* 14 Cal.App.5th at p. 445 [""[i]f the opposing party's evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion""]; *Howard v. Omni Hotels Management Corp., supra,* 203 Cal.App.4th at p. 420 ["[i]t is not appropriate at the time [of filing the opposition] to raise new legal theories or claims not yet pleaded, if there has been no request for leave to amend accordingly, prior to the summary judgment proceedings"]; *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648 ["a plaintiff wishing 'to rely upon unpleaded theories to defeat summary judgment' must move to amend the complaint before the hearing"]; *Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1186 [same].)

resort following the court's announcement of its ruling in favor of the Nikkei parties. This was too late. "When a plaintiff seeks leave to amend his or her complaint only after the defendant has mounted a summary judgment motion directed at the allegations of the unamended complaint, even though the plaintiff has been aware of the facts upon which the amendment is based, '[i]t would be patently unfair to allow plaintiffs to defeat [the] summary judgment motion by allowing them to present a "moving target" unbounded by the pleadings.'" (*Falcon, supra,* 224 Cal.App.4th at p. 1280; accord, *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 176.) Under these circumstances the court's denial of Arikawa's request for leave to amend was not an abuse of discretion. (See *Falcon,* at pp. 1280-1281; *Record v. Reason* (1999) 73 Cal.App.4th 472, 486 [court did not err in denying the plaintiff leave to amend complaint to defeat summary judgment when plaintiff "had knowledge of the circumstances on which he based the amended complaint on the day he was injured," long before he filed the action].)

c. *Arikawa's misclassification claims*

Most of Arikawa's Labor Code claims are premised on allegations Nikkei and Seniority misclassified him as an exempt employee and, as a nonexempt employee, he was deprived of overtime pay and other protections of the Labor Code and Industrial Welfare Commission (IWC) wage order No. 5-2001 (wage order 5), which governs the public housekeeping industry. (See Lab. Code, § 515, subds. (a) ["[t]he [IWC] may establish exemptions from the requirement that an overtime rate of compensation be paid pursuant to [Labor Code] [s]ections 510 and 511 for executive, administrative, and professional

employees, if the employee is primarily engaged in the duties that meet the test of the exemption, customarily and regularly exercises discretion and independent judgment in performing those duties, and earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment"], (e) ["primarily" for purposes of the Labor Code and the applicable wage order "means more than one-half of the employee's worktime"]; Cal. Code Regs., tit. 8, § 11050, subds. 1(B)(1) [enumerating requirements for executive exemption] & 2(P) [defining public housekeeping industry to include restaurants, rest homes, and similar establishments].) Exemptions from wage-related protections under the Labor Code and wage order are narrowly construed and, as affirmative defenses, must be proved by the employer. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794-795; *Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 374-375.)

An employee exempt under the executive exemption of wage order 5 is one (a) whose "duties and responsibilities involve the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof; and [¶] (b) [w]ho customarily and regularly directs the work of two or more other employees therein; and [¶] (c) [w]ho has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status or other employees will be given particular weight; and [¶] (d) [w]ho customarily and regularly exercises discretion and independent judgment; and [¶] (e) [w]ho is primarily engaged in duties which meet the test of the exemption. . . . The work actually performed by the employee during the course of the workweek must, first

and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectation and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement." (Wage Order 5, subd. 1(B)(1)(a)-(e).) Because the elements of the exemption are listed in the conjunctive, all criteria must be met for the exemption to apply. (*Martinez v. Joe's Crab Shack Holdings, supra,* 231 Cal.App.4th at p. 375; *Heyen v. Safeway Inc.* (2013) 216 Cal.App.4th 795, 817.)

The motion for summary judgment addressed each of these criteria: Arikawa was involved in the management of a "customarily recognized department" of Nikkei (dining services); he customarily and regularly directed the work of a staff of 12; he made hiring and advancement and promotion suggestions of employees he supervised, including successfully advocating for wage increases for them; his recommendations, while not final, were given great weight; he customarily and regularly exercised discretion and independent judgment over the menu, employees and scheduling; and he earned more than twice the minimum wage for full time employment. Nikkei also identified its reasonable expectations of Arikawa's position.

Despite this evidence, Arikawa contends Nikkei and Seniority failed to carry their burden on summary judgment because they provided no evidence as to the amount of time Arikawa spent doing discretionary activities that fall within the exemption compared to nondiscretionary activities, such as cooking and cleaning, which he insists do not, and therefore did not prove he "primarily" engaged in exempt activities. At the very least, Arikawa contends, his declaration raised a triable issue of material fact as to the applicability of the exemption, and

the court erred in concluding his declaration contradicted his deposition testimony.

That Nikkei and Seniority did not separately identify how much time Arikawa spent on exempt activities versus nonexempt activities does not mean they failed to carry their burden to show Arikawa was "primarily engaged" in duties that met the test for the executive exemption. Motoyasu's declaration and Arikawa's own testimony that he was responsible "for everything" to do with the kitchen service indicated that Arikawa's executive and nonexecutive duties were not severable. That is, Arikawa continued to engage in discretionary and supervisory duties even while he cooked and cleaned and engaged in more manual activities. (See *United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1027 (*UPS*) [although Taylor engaged in some rote, mechanical work, his conclusory declaration failed to show that that work "materially constrain[ed] his discretion and judgment"]; cf. *Mora v. Big Lots Stores, Inc.* (2011) 194 Cal.App.4th 496, 503, fn. 6 [the same activity could be exempt as managerial or nonexempt, depending on the manager's intent in performing the task; if the store manager was training or attempting to motivate an employee, an otherwise nonexempt activity such as stocking inventory is properly classified as managerial].)

Because Nikkei and Seniority carried their burden on summary judgment, the burden then shifted to Arikawa to raise a triable issue of material fact as to the applicability of the executive exemption. Arikawa might have demonstrated, for example, that his duties were, in fact, severable, and he spent less than 50 percent of his time on exempt activities. His conclusory declaration that he "was a cook," however, failed to do

so. (See *UPS*, *supra*, 190 Cal.App.4th at p. 1027 [plaintiff's "conclusory declaration did not provide any material facts" as to his nonexempt duties to undermine the evidence in employer's motion].) Furthermore, instead of explaining what he meant by his deposition testimony that he was responsible "for everything" to do with the kitchen and had discretion over the menu, employees and all other matters dining related, Arikawa retreated from it, stating in his declaration that he was a cook with no autonomy or discretion over anything at all. That declaration, as the court found, contradicted, rather than enhanced or clarified, his prior testimony. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 500, fn. 12 ["a party cannot create an issue of fact by a declaration which contradicts his prior discovery responses"]; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21-22 [same]; cf. *Scalf v. D.B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1524-1525 [court did not err in considering declaration that appeared to contradict prior discovery response when plaintiff provided "reasonable explanation" for discrepancy].)

Finally, Arikawa's testimony and declaration that he lacked "ultimate decisionmaking power," without more, was not sufficient to defeat summary judgment. (See *Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 148 [""[t]he fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment""]; *UPS, supra,* 190 Cal.App.4th at p. 190 [same].) The court did not err in granting summary judgment with respect to Arikawa's Labor Code misclassification claims.

d. *Other claims*

Arikawa does not challenge on appeal the trial court's rulings on his other claims for wages due on termination, slander, intentional infliction of emotional distress or unfair competition/unfair business practices. Accordingly, we do not consider them.

DISPOSITION

The judgment is affirmed. Nikkei, Seniority, Motoyasu and Perez are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.